To use the words of the learned Lord President further down in his judgment in the same case, it is no doubt true that the question whether a particular adventure is in the nature of trade or not must depend on its character and circumstances, but if, as in the present case, the purchase is made for no purpose except that of resale at a profit, there seems little difficulty in arriving at the conclusion that the deal was in the nature of trade, though it may be wholly insufficient to constitute by itself a trade.

In my judgment, both the Special Commissioners and the learned judge were quite right in holding that the only reasonable inference from the facts and the surrounding circumstances of the case was that the acquisition by the appellant of this piece of land and its sale not long afterwards was an adventure in the nature of trade. I would therefore dismiss the appeal with costs.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Lim Ewe Hock.*

MALAYAWATA STEEL BERHAD v. GOVERNMENT OF MALAYSIA & ANOR.

[F.C. (Suffian L.P., Raja Az'an Shah and Wan Suleiman F.JJ.) June 29, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 108 of 1974]

Equity — Equitable assignment — Assignment of right to receive payment from respondent for steel supplied by appellants to construction company — Assignment conditional, non-absolute and severable — Assignment enforceable only where respondent instructed by construction company to make payment direct to appellants — Assignment unenforceable.

This was an appeal from the decision of Mohamed Azmi J. ([1975] 1 M.L.J. 22). The appellants had claimed payment of the sum of $215,618.68 being the balance of payment due for the supply of steel to a construction company for the Radio House project of the Government. The claim was based on an equitable assignment alleged to have been made in favour of the appellants with the construction company as assignor and the Government as the debtor. The Government had agreed to pay the cost of steel supplied direct to the appellants, if so directed from time to time by the construction company. The learned trial judge dismissed the claim and the appellants appealed to the Federal Court.

Held, dismissing the appeal: (1) the arrangement in this case was not absolute and therefore not a valid equitable assignment but merely a request to the respondents to pay the appellants. Such a request or authorization did not give the appellants any rights against the respondents and could be revoked by the creditor, the construction company;

(2) the learned judge was right when he said that the assignment was enforceable only on an *ad hoc* basic whenever the P.W.D. was instructed by the construction company to make the payment direct.

Cases referred to:-

(1) *Williams Brandt Sons & Co.* v. *Dunlop Rubber Co.* [1905] A.C. 454, 462.

(2) *Re McArdle's case* [1951] 1 All E.R. 905.

(3) *Durham Brothers* v. *Robertson* [1898] 1 Q.B. 765.

(4) *Tancred* v. *Delagoa Bay and East African Railway* (1889) 23 Q.B.D. 239.

(5) *Ex parte Hall, In re Whitting* (1878) 10 Ch. D. 715.

(6) *Coulls* v. *Bagot's Executor and Trustee Co. Ltd.* [1967] A.L.R. 385.

FEDERAL COURT.

Chin Yew Meng for the appellants.

Fong Seng Yee (Senior Federal Counsel) for the respondents.

Raja Azlan Shah F.J.: The appellants supplied steel bars to the builder, NKHC. The question on the appeal was whether the arrangement contained in the letters of July 20, 1968, August 8 and 10, 1968 and September 13 and 18, 1968 made between NKHC, the appellants, and J.K.R. ("the respondents") was a valid equitable assignment by NKHC to the appellants of all monies due to NKHC from the respondents. If it was not, that was the end of the matter. If it was, then a further question arises as to the quantity of steel bars supplied and their value.

The circumstances under which this litigation arose were as follows. NKHC had contracted with the respondents to construct a Radio House, two office towers and a large auditorium at Bukit Putri, Kuala Lumpur, for the sum of M$7,870,013.95. That contract was entered into in January 18, 1967. By exchange of letters dated June 25, July 2, and July 25, 1968 the appellants agreed to supply NKHC with steel bars and the terms of payment were by way of irrevocable 120 days letter of credit or by J.K.R. guarantee. These terms, which was the issue in the present dispute, were subsequently modified by the parties *vide* the exchange of letters.

On July 20, 1968 NKHC wrote to appellants "in respect of the term of payment for your above steel supply will be accepted if the P.W.D. is authorised to deduct the amount from our interim payment and made direct to you instead of a J.K.R. guarantee."

On the same day NKHC wrote to J.K.R. with a copy to appellants regarding the alternative arrangement of payment as agreed between NKHC and appellants; the letter reads, *inter alia*:

"In this connection, we hereby agree to authorize the P.W.D. to deduct from our progress payment and make direct payment to Malayawata Steel Berhad on the amount of steel supplied for the above project. We would like to have your written confirmation with a copy to Malayawata Steel Berhad that the P.W.D. can arrange the above."

J.K.R. replied in August 8, 1968, *inter alia*, as follows:

"2. Your request has been considered by the Treasury and has been approved. However, please note that for *purpose of progress payments*, the deformed steel bars (whether as unfixed materials on site or incorporated in the works) will be valued in accordance with the conditions of contract. To assist the Quantity Surveyor in assessing the quantities of steel brought on to the site, please arrange for copies of Malayawata's delivery notes of the steel to be sent to this office."

On August 10, 1968 NKHC confirmed by letter to J.K.R. that they were agreeable to the J.K.R.'s suggestion contained in para. 2 above.

On September 13, 1968 NKHC again reminded the appellants of their new arrangement with regard to the method of payment. The final paragraph of the letter reads:

"We wish to draw your attention to the arrangement agreed between you and our Messrs. Lim and Ooi for you to forward all your Invoices to us for checking and verification first and thereafter we will forward your invoices together with our recommendation for payment to Jabatan Kerja Raya. Please therefore note that in future you should not forward any Invoices to Jabatan Kerja Raya direct but will follow the procedure as stated above so as to avoid referring back and forth as the most important thing is that all tonnage received must be checked and confirmed by us first."

The appellants confirmed the new arrangement *vide* their letter of September 18, 1968 to NKHC, which reads:

"We confirm we have agreed to this arrangement and are pleased to note that you have also promised to submit the duplicate invoices to the P.W.D. as soon as you have completed the checking and will copy us the letter addressed to the P.W.D. indicated therein the amount to be deducted from your progress payments."

NKHC were in financial difficulties and in October 8, 1969, the appellants sued them for a sum of $211,618.64 (inclusive of the present claim) being balance due in respect of steel bars supplied as at September 30, 1969 — *vide* K.L. High Court C.S. 1797/1969. Before the case got off the ground NKHC was made a bankrupt by Messrs. Jardine Waugh (M) Sdn. Bhd. in 1970. As a consequence, the 2nd respondent was brought in as a second defendant so that the court could adjudicate finally and conclusively the dispute between the parties in one action.

The learned trial judge held that the assignment was conditional and not absolute and on the facts it was not enforceable. He therefore dismissed the claim. The appellants appealed on the ground that it was a valid equitable assignment.

The learned trial judge in a painstaking judgment analysed the evidence and arrived at the view that it was within the knowledge of all parties that the assignment was subject to certain conditions and was not intended to be absolute. The framework of the arrangement, so the judge held, was that J.K.R. on behalf of NKHC would pay direct to appellants subject to the conditions, first, that for the purpose of computing progress payment, all steel bars would be valued in accordance with the conditions of contract between the government and NKHC, and, secondly, to assist the Government Quantity Surveyor in assessing the quantity of steel delivered at site, copies of appellants' delivery invoices should be sent to J.K.R. That would inevitably have involved reference to NKHC. This finding, the judge said, was substantiated by what was stated in the final paragraph of the letter of September 13, 1968 and confirmed by the appellants in their letter of September 18, 1968. He therefore held on the evidence that the parties acknowledged NKHC's right to give instruction to J.K.R. and to determine the amount to be deducted and paid to appellants. If it was the intention of the parties to make an absolute assignment, then there was no necessity to reserve to NKHC the power to direct J.K.R. as to the amount to be deducted from each progress payment.

I am prepared to accept, for the purposes of this judgment, the view that if what was clear as evinced by the new arrangement was to assign, to make over all the progress payments completely and absolutely to the appellants, they are entitled to succeed. But it seems to me equally clear that whether the arrangement had that effect is a matter of the intention to be derived from that arrangement itself and the evidence of it. No rule can be laid down as to the form requisite for a valid equitable assignment. "The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear": see *Williams Brandt Sons & Co.* v. *Dunlop Rubber Co.*[1]

The question therefore arises as to whether the arrangement which as the learned judge held was the framework of the assignment in the present case was absolute and not conditional. What is meant by a valid equitable assignment is well illustrated in the judgments delivered in *Re McArdle's*[2] case where the real issue was not the law of consideration but the construction of the instrument claimed to be an assignment. In that case the appellant failed because the document on which she relied was not complete. In the form in which it was drafted, the executors (the holder of the fund) "would not have been obliged to pay that sum without taking proper steps to verify that the work ... had ... been done. That would inevitably have involved reference to assignors." Because of the requirement of reference to the assignors the gift was not complete: they had a *locus poenitentiae*. In *Burham Bros.* v. *Robertson*[3] the assignment of a book debt was expressed to endure until, and only until, money lent by the assignee to the assignor was repaid. This was held to be a conditional assignment. It did not transfer the whole debt to the assignee unconditionally, but only until the advances were repaid. The debtor could not be sure that he was paying his debt to the right person without knowing the state of accounts between the assignor and the assignee. He would in the end have to investigate their state of accounts. But if the debtor knows and can find out by simply looking at his own books to whom he owes the debt the assignment is absolute and complete. The distinction between these cases can best be understood by looking at the situation from the point of view of the debtor and assuming he wants to pay the debt. Thus in *Tancred* v. *Delagoa Bay and East Africa Railway*[4] a debt was assigned as security for a loan of money with the proviso that if the assignor repaid the loan, the debt should be reassigned to him. That was held to be an absolute assignment. Although the assignment was subject to a condition, the debtor was not prejudiced. Firstly, he would receive notice of the assignment; secondly, he would also receive notice of the reassignment, if one was made, so that he would always be in a position to know to whom he owed the debt by simply looking at his own books.

Applying these principles to the present case, I take the view that the judgment of the learned judge must be affirmed. To satisfy the appellants' claim they must be able to find in the new arrangement an intention to assign the progress payments to them, so that the debtor (the respondents) might know how much they were justified in paying to the appellants. Looking at the arrangement as a whole, I think that it was not a clear and unconditional directive to pay the sum of money, but was conditional upon the need to refer the matter back to the assignor, i.e., the

requirement that the respondents (the debtor) must ascertain from NKHC as to the state of accounts between NKHC and the appellants in order to verify the supply of steel that had been made. That being so, the arrangement was not absolute and therefore not a valid equitable assignment but merely a request to the respondents to pay the appellants. Such a request or authorisation did not give the appellants any rights against the respondents, and could be revoked by the creditor (NKHC). They had a *locus poenitentiae*. Thus in *Ex parte Hall, In re Whitting*[5] a landlord wrote to his tenant "authorising and requesting" him to pay the rent to the landlord's bank "to my credit for which I will accept their receipt as so much of your rent discharged." This was not an assignment, but only an authority to the tenant to pay the bank. In *Coulls* v. *Bagot's Executor and Trustee Co. Ltd.*[6] an agreement between *A* and *B* provided for payment of royalties by *B* to *A* and concluded: "I (A) authorise ... (B) to pay all money connected with this agreement to my wife ... and myself ... as joint tenants." The document was signed by *A*, *B* and *A's* wife. A majority of the High Court of Australia took the view that the agreement did not contain a promise by *B* to *A* to pay *A's* wife but only a *mandate* by *A* to *B* to pay *A's* wife. This mandate was revocable and had been revoked by *A's* death.

In the circumstances the learned judge was right when he said that the assignment was enforceable only on an *ad hoc* basis whenever the PWD was instructed by NKHC from time to time to make the payment direct and which was consistent with the fact that out of the fifteen progress payments due to NKHC, only five of them, namely, the fourth, eighth, tenth, eleventh and fifteenth progress payments were paid direct to the appellants on the instructions of NKHC. If it was the intention of the parties to make absolute assignment of all NKHC's rights to the appellants, then there was no necessity to reserve to NKHC the power to direct PWD as to the amount to be deducted from each progress payment. As matters stood, for every payment, the PWD must first obtain instruction from NKHC as to the amount to be released to the appellants.

For my part I will dismiss the appeal with costs.

Suffian L.P. and **Wan Suleiman F.J.** concurred.

Appeal dismissed.

Solicitors: *Allen & Gledhill.*

SYARIKAT BANITA SDN. BHD. v. GOVERNMENT OF STATE OF SABAH

[F.C. (Suffian L.P.) June 30 and July 1, 1977]

[Kuala Lumpur — Federal Court Civil Application No. 2 of 1977]

Constitutional Law — State Legislation — Challenge on the ground that it is contrary to Federal Constitution — Competency of State legislature to make law not challenged — High Court has original jurisdiction — Leave of judge of Federal Court not required — Federal Constitution, Articles 4(3) and (4), 8, 13 and 128.

In this case the applicant intended to sue the Sabah Government for a declaration that a new subsection (7) of section 24 of the Sabah Forests Enactment, 1968, was void as it was contrary to several provisions of the Federal Constitution. The applicant applied to a judge of the Federal Court for leave to bring the action.

Held: as the validity of the new section is to be challenged on the ground that it is contrary to the provisions of the Federal Constitution and not on the ground that it deals with a matter with respect to which the Sabah legislature has no power to make law, the High Court has jurisdiction in the matter and the leave of a judge of the Federal Court is not required.

Cases referred to:-

(1) *Stephen Kalong Ningkan* v. *Tun Haji Openg & Tawi Sli (No. 2)* [1967] 1 M.L.J. 46.

(2) *Yeoh Tat Thong* v. *Government of Malaysia & Anor.* [1973] 2 M.L.J. 86.

(3) *Ah Thian* v. *Government of Malaysia* [1976] 2 M.L.J. 112.

FEDERAL COURT.

S.D.K. Peddie for the applicant.

Nicholas Fung Ngit Chong (State Attorney-General) for the respondent.

Suffian L.P.: I ruled that (1) the leave sought by the applicant is unnecessary and (2) the High Court has jurisdiction to determine the matter in dispute. My reasons for so ruling are as follows.

The applicant company had a timber concession in Sabah and some time late in 1976 or early in 1977 the Sabah Government cancelled the concession, acting under a new subsection (7) of section 24 of the Sabah Forests Enactment 1968 which gives power to a Minister to revoke or cancel in the public interest timber licences issued prior to July 15, 1976.

The applicant intended to sue the Sabah Government in the Federal Court for a declaration that the new subsection (7) was void because of several reasons and for consequential relief. Some of the reasons were:

(1) the new subsection (7) was law which provided for the compulsory acquisition of property without compensation and was therefore contrary to article 13(1) of the constitution;

(2) the new subsection was colourable legislation and an attempt to circumvent article 13(1);

(3) the new subsection was discriminatory (article 8?); and

(4) the new subsection interfered with the applicant's fundamental right under the constitution to acquire, hold and dispose of property.